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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

In the Matter of the Application of)
The Cincinnati Gas & Electric Company)
To Modify its Non-Residential Generation)
Rates to Provide for Market-Based Standard) Case No. 03-93-EL-ATA
Service Offer Pricing and to Establish a Pilot)
Alternative Competitively-Bid Service Rate)
Option Subsequent to Market Development)
Period.)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting) Case No. 03-2079-EL-AAM
Procedures for Certain Costs Associated)
with The Midwest Independent Transmission)
System Operator.)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting) Case No. 03-2081-EL-AAM
Procedures for Capital Investment in its) Case No. 03-2080-EL-ATA
Electric Transmission and Distribution)
System And to Establish a Capital)
Investment Reliability Rider to be Effective)
After the Market Development Period.)

PUBLIC VERSION

**MOTION FOR PROTECTIVE ORDER PENDING COMMISSION
GRANTING OCC'S MOTION FOR APPROVAL OF REDACTIONS AND
MOTION FOR APPROVAL OF SUCH REDACTIONS, FILED
IN COMPLIANCE WITH COMMISSION'S OCTOBER 24, 2007 ORDER AND
DECEMBER 20, 2007 ENTRY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Pursuant to Ohio Adm. Code 4901-1-24, the Office of the Ohio Consumers'

Counsel ("OCC") hereby moves the Public Utilities Commission ("PUCO" or

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“Commission”) for a protective order regarding certain information previously asserted to be confidential by Duke Energy Ohio, Inc. (“Duke Energy”), its affiliates Duke Energy Retail Sales, LLC (“DERS”) and Cinergy Corp. (“Cinergy”), and other parties to these cases. The Motion for a Protective Order is made pending an order by the Commission approving OCC’s redactions (which are intended to allow for more information to be part of the nonconfidential record that the public can view). (“Motion for Protection”).

Furthermore, pursuant to Ohio Adm. Code 4901-1-12, OCC hereby moves the Commission for approval of the redactions filed in compliance with the Commission’s Order on Remand (“Motion for Approval”). The OCC filed the redactions simultaneously with these Motions as required by the Order on Remand (“Order”).¹

Under the expedited procedures for pleadings set forth in the Attorney Examiners’ February 2007 Entry, the Motion for Protective Order and Motion for Commission Approval of Redactions must be served electronically, memoranda contra are due in seven days, and replies are due three days thereafter.²

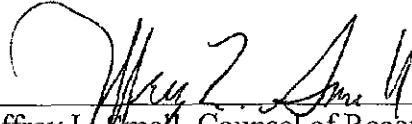
The grounds for these Motions are more fully described in the accompanying Memorandum in Support.

¹ By these Motions, the OCC does not concede that any of the information submitted under seal contains trade secrets.

² Entry at 3 (February 1, 2007).

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

A handwritten signature in black ink, appearing to read "Jeffrey L. Small", is written over a horizontal line.

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System And to Establish a Capital)	
Investment Reliability Rider to be Effective)	
After the Market Development Period.)	

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On October 24, 2007, the Commission issued the Order on Remand ("Order") in the above-captioned cases where it was OCC's position that the public record should contain various information that the Commission had accepted as confidential. In the Order, the Commission stated:

[P]ursuant to our ruling on this [confidentiality] issue, those documents must now be redacted to keep confidential only those

matters we have ruled to be trade secrets. In order to accomplish this task, Duke shall work with the parties to the side agreements to prepare a redacted version of the confidential information attached to the pre-filed testimony of Ms. Hixon and will file that redacted version within 45 days of the date of this order on remand. Each party will then be required to redact all other sealed documents that such party filed with the Commission. Redacted versions of all documents filed in these proceedings shall be docketed no later than 60 days after the date of this order on remand.³

On December 7, 2007, Duke filed redacted side agreements to reveal more information in the public docket.

On December 13, 2007, OCC filed a Motion for Extension to request thirty additional days to provide the new redactions (i.e. fewer redactions than before, and more publicly available information) requested by the Commission. On December 20, 2007, the Commission granted OCC's Motion for Extension, thereby making the OCC's redactions due January 23, 2008.⁴ The OCC hereby files, under seal, redacted documents intended to reveal information deemed by the PUCO to be appropriate for the Commission's public files.

II. OHIO LAW REGARDING PUBLIC RECORDS

R.C. 4901.12 requires that "all proceedings of the public utilities commission and all documents and records in its possession are public records," except as provided in the exceptions under R.C. 149.43. R.C. 149.43 is Ohio's public records law. R.C. 4905.07 states that, "[e]xcept as provided in section 149.43 of the Revised Code . . . , all facts and information in the possession of the public utilities commission shall be public" The

³ Order on Remand at 17 (October 24, 2007).

⁴ Entry at 2 (December 20, 2007).

Commission has noted that R.C. 4901.12 and R.C. 4905.07 “provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome.”⁵

Ohio Adm. Code 4901-1-24(D) requires of the PUCO that “[a]ny order issued under this paragraph shall *minimize* the amount of information protected from public disclosure.”⁶ The Commission stated in a 2004 case:

The Commission has emphasized, in *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry issued November 23, 2003, that:

[a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio’s public records law (Section 149.43, Revise Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio public records law is intended to be liberally construed to ‘ensure that governmental records be open and made available to the public ... subject to only a few very limited exceptions.’ *State ex. rel. Williams v. Cleveland* (1992), 64 Ohio St. 3d 544, 549, [other citations omitted].⁷

Faced with demands for “wholesale removal of the document from public scrutiny,”⁸ the Commission reviewed several documents in the above-cited telephone case and

⁵ *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, *Opinion and Order* at 5 (October 18, 1990).

⁶ Emphasis added.

⁷ *In re MxEnergy, Inc.*, Case No. 02-1773-GA-CRS et al., Entry at (3) (September 7, 2004) (notations in original).

⁸ *Id.* at 3.

determined in each circumstance how documents could be redacted “without rendering the remaining document incomprehensible or of little meaning...”⁹

The Commission’s rules also have a bearing on the treatment of information over which a claim is made regarding trade secrets. Ohio Adm. Code 4901-1-27 (B)(7)(e) states that the Commission shall:

take such actions as are necessary to * * * prevent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information. The presiding hearing officer may, upon motion of any party, direct that a portion of the hearing be conducted *in camera* and that the corresponding portion of the record be sealed to prevent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information.

* * * The commission or the presiding hearing officer shall issue a ruling prior to the closing of the case regarding the amount of time that any sealed portion of the hearing record shall remain sealed.

The Order states that the Commission conducted such an *in camera* review in this case.¹⁰

The legal obligation to follow Ohio law regarding the public nature of the documents in the Commission’s possession is the responsibility of the PUCO. The OCC, as a public entity, must meet its own obligations regarding the treatment of documents. As a party to these proceedings, however, the OCC seeks to aid the Commission in performing its obligations under Ohio law. In that regard and consistent with the Commission’s rulings, the OCC has undertaken a substantial review to provide new redactions to documents that were previously submitted in these cases with the intention of including more information in the public record.¹¹ The decision rests with the PUCO to make any needed adjustments to the redaction efforts performed by the OCC and other

⁹ Id.

¹⁰ Order at 17. (“Based on our *in camera* review of the documents in question, we believe that they can be redacted to shield the trade secret information while, at the same time, disclosing all information that we have not found to be a trade secret, without rendering the documents incomprehensible or of little meaning.”)

¹¹ As OCC has argued before, more information should be placed in the public record. However, the OCC limits its proposal at this point to providing the redactions that are consistent with the Commission’s Order.

parties for purposes of providing the public with more extensive information regarding the Commission's case work and decisions.

III. ARGUMENT

As the Commission is aware, the determination of what information in these cases should be available to the public has been a contentious issue. Many of the sealed documents offered by the OCC in these cases were obtained pursuant to protective agreements with Duke Energy, DERS, Cinergy, the Ohio Hospital Association, and Kroger during the litigation and such information has been treated under a protected status. The OCC never agreed with these other parties that the resulting protected status under the protective agreements was appropriate in these cases (i.e. other than for purposes of the protective agreements that were signed subject to legal arguments about what should be placed in the public record). However, the OCC has exercised caution when deciding what information to release to the public, and has in some circumstances even protected information that the Duke-affiliated companies failed to properly protect according to the protective agreements executed between the OCC and these companies.

The OCC has attended to details to perform new redactions. However, the OCC and the Duke-affiliated companies have consistently taken different views regarding the treatment of information submitted in these cases. This difference in views extends to the redactions provided by Duke Energy on December 7, 2007. Those redactions appear to exceed those ordered by the Commission in its Order dated October 24, 2007 (i.e. Duke Energy redacted too much information from the public record).

Specifically, we find that the following information has actual or potential independent economic value from its being not generally known or ascertainable: customer names, account numbers,

customer social security or employer identification numbers, contract termination dates or other termination provisions, financial consideration in each contract, price of generation referenced in each contract, volume of generation covered by each contract, and terms under which any options may be exercisable.¹²

The OCC submitted a timely Application for Rehearing regarding the Commission holding too much information from the public in its Order dated October 24, 2007. No party submitted an application for rehearing that claimed that the PUCO erred by withholding too little information from the public. It was inappropriate for Duke Energy to attempt to keep additional information from gaining public status through the re-filing of heavily redacted documents in December. Whatever the reasons for the additional redactions, the parties who participated in discussions regarding the redactions¹³ have not closely followed the PUCO's application of Ohio law regarding trade secrets.

The situation discussed directly above raises a new controversy as parties such as the OCC provide newly redacted versions of their submissions that, in part, conflict with the redactions provided by the Company.¹⁴ Many examples can be given concerning Duke Energy redactions that do not comply with the Commission's Order, and the OCC herein provides examples that illustrate patterns with the Company's filing on December 7, 2007.

The Company's treatment of the attachments to the testimony of OCC Witness Hixon contains the redaction of all the names of personnel associated with the Duke-

¹² Order at 15 (October 24, 2007).

¹³ The Commission's Order instructed Duke Energy to "work with the parties to the side agreements to prepare a redacted version of the confidential information attached to the prefiled testimony of Ms. Hixon" Order at 17 (October 24, 2007).

¹⁴ The conflict is particularly acute for the OCC because the redactions provided by Duke Energy concerned a document -- the testimony of OCC Witness Hixon -- presented to the Commission by the OCC.

affiliated companies which does not fall within any of the information that the PUCO determined should be redacted. The Company redacted the presence of its lead counsel on numerous documents and other counsel who were involved with the creation of documents.¹⁵ The Company also redacted the names of its personnel who are mentioned in documents that are not agreements with customers, such as the description of the Duke Energy litigation process¹⁶ and unprivileged communications between personnel representing different entities.¹⁷

The Company redacted the names and contents of documents that identify entities other than “customers,”¹⁸ and therefore the redacted information lies outside that which the PUCO determined should be redacted. Also, *nearly all dates*, not just contract termination dates as stated by the Commission, have been redacted by the Company.¹⁹ To address the redaction of these attachments in accordance with the Commission’s Order, the OCC files corrections to the Company-provided redactions to the documents that served as attachments to OCC Witness Hixon’s testimony.

¹⁵ See, e.g., Duke Energy’s Redacted Attachments (December 7, 2007), BEH Attachment 2, Bate Stamp 351 (“[REDACTED]”); BEH Attachment 2, Bate Stamp 350 (“[REDACTED]”); Attachment 17, Bate Stamp 88 (“[REDACTED]” for Cinergy Retail Sales, and “[REDACTED]” for Cinergy Corp.).

¹⁶ Duke Energy’s Redacted Attachments (December 7, 2007), BEH Attachment 21 (“[REDACTED],” “[REDACTED]” “[REDACTED],” “[REDACTED],” “[REDACTED],” which includes the names of Duke Energy witnesses).

¹⁷ See, e.g., Duke Energy’s Redacted Attachments (December 7, 2007), BEH Attachment 7, E-mail from [REDACTED] (including redaction of the entire contents of the communication).

¹⁸ See, e.g., Duke Energy’s Redacted Attachments (December 7, 2007), BEH Attachment 1, Bate Stamp 348 (“[REDACTED]”); BEH Attachment 2, Bate Stamp 330 (“[REDACTED]”); BEH Attachment 4, Bate Stamp 341 (“[REDACTED]”).

¹⁹ See, e.g., Duke Energy’s Redacted Attachments (December 7, 2007), BEH Attachment 1, Bate Stamp 347 (“[REDACTED]”); BEH Exhibit 3, Bate Stamp 333 (“[REDACTED]”); [REDACTED];

As a result of the foregoing, the OCC submits its redactions under seal and requests that the Commission approve the OCC's submissions by instructing the PUCO's Docketing Division to publicly file the documents that the OCC submits and also publicly file the Motion for Protection, Motion for Approval, and this associated Memorandum in Support entirely unredacted (i.e. render the confidential version entirely public). The documents being submitted with the Motion to Approve are as follows:

OMG Ex R-4 Transcript of Whitlock (February 14, 2007);²⁰
OCC Ex. R-2(A) Testimony of Beth E. Hixon (March 9, 2007);²¹
OCC Ex. R-5 Response to OCC Interrogatory 55 (March 3, 2007);
OCC Ex. R-6 Transcript of George Deposition (March 15, 2007);
OCC Ex. R-7 Transcript of Ziolkowski (March 15, 2007);
OCC Ex. R-8 Transcript of Ficke (March 15, 2007);
OCC Memorandum Contra Duke Energy Motion for Protection (March 13, 2007);
OCC Initial Post-Remand Brief, Hearing Phase II (April 13, 2007);
OCC Reply Post-Remand Brief, Hearing Phase II (April 27, 2007);
OCC Application for Rehearing (November 23, 2007).

The un-redacted version of this Memorandum in Support should also be docketed since, as the OCC describes herein, none of the examples provided in this pleading (which has been redacted, in an abundance of caution) should have been redacted by Duke Energy in its filing on December 7, 2007.

²⁰ The transcript was filed by the OCC, but was an OMG exhibit at the hearing. The transcripts include attachments, but those attachments are also located in the attachments to OCC Witness Hixon's testimony.

²¹ As described, corrected pages that contain the attachments to OCC Witness Hixon's testimony are included in the OCC's submissions.

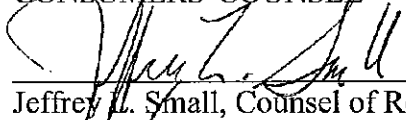
In an abundance of caution, the OCC files the newly redacted documents under seal to preclude any claims that the OCC has acted inappropriately by parties that have unendingly argued that information should be withheld from the public -- Duke Energy's filing on December 7, 2007 appears to continue that argument even after the Commission has ruled regarding the release of additional information to the public record. The need for the OCC's caution is heightened by the fact that the OCC submits redactions that conflict in some respects with those submitted by Duke Energy.

III. CONCLUSION

The OCC hereby requests the Commission to grant the Motion for Protection, pending a Commission entry granting OCC's Motion for Approval. The PUCO should determine that the OCC's redactions comply with the Commission's Order and thereafter release the newly redacted documents to the PUCO's public files so that the public record provides access to more information than is available now.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
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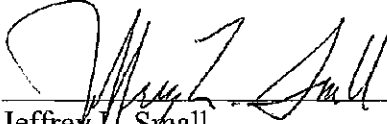
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion for Protective Order* and *Motion for Approval* by the Office of the Ohio Consumers' Counsel were served electronically on this 23rd day of January 2008. The confidential version of the motions and newly redacted OCC filings were provided (electronically) to parties who received confidential versions of information during the hearings for these cases (e.g. OCC testimony, Briefs, and Reply Briefs), and counsel for such parties should handle the information under the same conditions that were placed on the handling of briefs.



Jeffrey L. Small
Assistant Consumers' Counsel

Unredacted documents:

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